United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1091

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B/S

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WILLIAM TERNER, :

Plaintiff-Appellant, :

-against- :

HON. JAMES D. HOPKINS, Justice of the Appellate Division of the State of New York, : HON. LEONARD RUBENFELD, J.S.C. of the State of New York, JAMES DEMPSEY, ESQ., HON. : ALVIN R. RUSKIN, J.S.C. of the State of New York, HON. HAROLD L. WOOD, J.S.C. of the : the State of New York, NEW YORK STATE SENATOR BERNARD G. GORDON, Chairman, N.Y.S. Judiciary Comm.; HON. MARTIN B. STECHER, J.S.C. of the State of New York, HON. WILLIAM A. WALSH, JR., J.S.C. of the State of New York, JERALD S. : KALTER, M.D., HON. JOHN C. MARBACH, J.S.C. of the State of New York, MILDRED TERNER, : KRAFTCO CORP., and MFG. HANOVER TRUST CO. (Transfer Agents for Kraftco Corp.), :

Defendants-Appellees. :

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BRIEF FOR APPELLEES STATE JUDGES

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BRIEF FOR APPELLEES STATE JUDGES

Questions Presented

1. Is this action, insofar as it seeks money damages against State judges barred by judicial immunity?

2. Is injunctive relief in this action barred by the doctrines of res judicata and collateral estoppel?

3. Assuming arguendo that an action for an injunction under the Civil Rights Laws lies in favor of an unsuccessful litigant in a State court, was summary judgment nevertheless properly granted in favor of the defendants?

Statement of the Case

This is an appeal from a judgment of the District Court for the Southern District of New York (Hon. Whitman Knapp, D.J.) entered January 7, 1976 granting summary judgment in favor of the defendants (JA 165).* The Court found from the record that plaintiff alleged no colorable claim under the Constitution and Laws of the United States to support a Civil Rights action brought pursuant to 42 U.S.C. 1983 (JA 163-164).

Plaintiff is the unsuccessful party in a

> "matrimonial dispute of exceeding bitterness even by the standards we have unhappily come to treat as normal in that

* Numbers in parentheses preceded by "JA" refer to pages of the Joint Appendix.

type of controversy. As usual in such situations each side accuses the other of prejury and overreaching" (JA 2-28, JA 162-163).

Plaintiff's amended complaint as summarized by the District Court, alleged that

"a) In the basic divorce action, the trial judge unreasonably rejected the husband's counterclaim of adultery;

b) The court unreasonably and without adequate consideration rejected various applications for rehearing and a new trial;

c) The court granted the excessive allowance to the wife and excessive counsel fees to her lawyers;

d) Various courts - including the Appellate Division - unreasonably refused adjournments to permit him to substitute new lawyers of his choice;

e) All the foregoing events can be explained by the circumstances that the wife's lawyer's friendship with various judges was so close as to suggest corruption" (JA 163).

Statement of the Facts

This action arises out of the case of Terner v. Terner, et al., Index No. 1309/1971 (Sup. Ct., Westchester Co., 1974) where Mr. Terner sought a declaratory judgment that he was the owner of

certain stock of the defendant Kraftco Corporation nominally held in the name of his wife, Mildred Terner, and to direct her to endorse the stock over to him (JA 62).

The action was originally set down to be tried on April 17, 1974 before Justice Marbach. It was postponed until April 24, 1974 because plaintiff's counsel, Irving I. Erdheim, Esq., was unavailable on that date. On April 24th, Mr. Erdheim moved to withdraw because of an insurmountable impasse with his client. He informed the Court, however, that Mr. Samuel Gottlieb was prepared to represent plaintiff. The case was then adjourned to the next day so as not to interfere with an already scheduled trial. The next day, however, plaintiff appeared without counsel. He claimed he was unable to procure Mr. Gottlieb or a member of Mr. Gottlieb's firm despite the fact that Mr. Gottlieb had been retained several weeks earlier on related matters. The trial commenced with the plaintiff acting pro se.

Justice Marbach attempted to assist plaintiff and explained to him legally relevant questions as to his cause of action (JA 129-130). Justice Marbach allowed plaintiff to testify in narrative form (JA 131-132). At the close of the trial, Justice Marbach held for Mrs. Terner noting her credibility as a witness and the legal unenforceability of Mr. Terner's claim (JA 140-141).

Judgment was entered on May 21, 1974, although plaintiff filed a notice of appeal to the Appellate Division, the appeal was dismissed for untimeliness (Record, No. 12, Exhibit 1, pp. 14-16). Plaintiff's motion for reargument was denied (Record, No. 12, Exhibit 1, pp. 12-13). The Court of Appeals affirmed the dismissal of the appeal on June 5, 1975 (Record, No. 12, Exhibit 2). Plaintiff then commenced the instant action under the Civil Rights Act, 42 U.S.C. § 1983 alleging violations of his constitutional rights out of the trial in the Supreme Court in Westchester County.

POINT I

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO THE ISSUE OF CIVIL LIABILITY.

A judge exercising his judicial function is not liable for damages under 42 U.S.C. § 1983 even though he acts erroneously or irregularly. Such an action is barred by the doctrine of judicial immunity. Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Imbler v. Pachtman, ____U.S.____, 44 LW 4250, 4254 (1976).

The claim for damages against Judge Marbach and the other judges named in the amended complaint clearly arose out of their official duties. Summary judgment as to the issue of damages was therefore proper.

POINT II

PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL BAR PLAINTIFF'S ACTION FOR INJUNCTIVE RELIEF.

Although plaintiff alleges judicial corruption in the State courts, he actually seek a re-litigation of the merits of the divorce action in the State court. Even though an action has independent purpose and contemplates some other relief, it constitutes a collateral attack on the underlying judgment if the new action must, if successful, overrule a previous judgment. Miller v. Meinhard-Commercial Corporation, 462 F. 2d 358 (5th Cir. 1972). Plaintiff's action for alleged judicial corruption is necessarily related to the merits of the State court proceeding. As such, the doctrine of res judicata bars plaintiff from re-litigating any issue which was or could have been raised in the State proceedings. Chicot County Drainage District v. Baxter State Bank, 308 U.S.

371 (1940); Taylor v. New York City Transit Authority, 433 F. 2d 665 (2nd Cir. 1970). The doctrine of res judicata has been applied to suits under § 1983. See Preiser v. Rodriguez, 411 U.S. 475, 497 (1973).*

The District Court lacked jurisdiction over this action because plaintiff, in effect, asked it to review State court proceedings for possible constitutional error. Such a review lies exclusively in the jurisdiction of the Supreme Court by certiorari, Rooker v. Fidelity Trust, 263 U.S. 413 (1923); Tang v. Appellate Division of Supreme Court, First Department, 487 F. 2d 138 (2nd Cir. 1973), cert. denied 416 U.S. 906 (1974); Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974); Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975), affd. ____U.S.____, 96 S. Ct. 1489 (1976).

* The doctrine of res judicata applies to actions brought under § 1983 so as to preclude the assertion of every legal theory that might have been raised in the state court proceedings. See Restatement (Second) of Judgments § 48 (Tent. Draft No. 1, 1973). The Supreme Court has not decided whether a party is allowed to fragment issues that could have been resolved in a simple action. Compare Brault v. Town of Milton, 527 F. 2d 730 (2nd Cir. 1975); Newman v. Board of Education, 508 F. 2d 277 (2nd Cir. 1975); Lombard v. Board of Education, 502 F. 2d 631 (2nd Cir. 1974), cert. denied 420 U.S. 976 (1975) which permit the action with Scroggin v. Schrunk, 522 F. 2d 436 (9th Cir. 1975), cert. denied ____U.S.____, 96 S. Ct. 1807 (1976); Francisco Enterprises v. Kirby, 482 F. 2d 481 (9th Cir. 1973), cert. denied 415 U.S. 916 (1974), which strictly enforce the doctrine of res judicata. See also Vestal, State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court, 27 Okla. L. Rev. 185 (1974).

POINT III

ISSUANCE OF AN INJUNCTION WOULD BE IMPROPER UNDER 1983 AND VIOLATIVE OF PRINCIPLES OF COMITY.

The prime purpose of appellant's request for injunctive relief is not to redress asserted constitutional deprivations but to attack the judgment of the State court. As such the subject motion is not cognizable under the Civil Rights Act and the court is without jurisdiction to issue an injunction. Lecci v. Cahn, 493 F. 2d 826, 829 (2nd Cir. 1974), Pierre v. Jordan, 33 F. 2d 951 (9th Cir. 1964), cert. denied 379 U.S. 974 (1965); Jemzura v. Belden, 281 F. Supp. 200 (N.D.N.Y. 1968), quoting Shakespeare v. Wilson, 40 F.R.D. 500, 502 (S.D. Cal. 1966):

> "This action, filed in pro. per., is a typical example of the kind of action being filed with increasing frequency under the provisions of the Civil Rights Act of 1871, 42 U.S.C. §§ 1981-1986. Having been defeated in state court proceedings and being unhappy and somewhat humiliated and frustrated by the results of such proceedings, these persons lash out at judges, attorneys, witnesses, court functionaries, newspapers and anyone else in convenient range, terming all of them corruptly evil and charging them with perjury and conspiracy in a last desperate effort to re-litigate the issues on which they have once lost and hoping to secure sizeable damages to boot." (Id. at 204).

Assuming arguendo that plaintiff's claim is cognizable herein, considerations of comity and federalism militate against allowing unsuccessful state litigants from re-litigating their state claims in a federal forum merely because they claim entitlement to an injunction. Timson v. Wiener, 395 F. Supp. 1344 (S.D. Ohio, 1975); Cf. Glasspoole v. Albertson, 491 F. 2d 1090 (8th Cir. 1974); Dotlich v. Kane, 497 F. 2d 390 (8th Cir. 1974). In Bottone v. Lindsley, 170 F. 2d 705, 707 (10th Cir. 1948), cert. denied 336 U.S. 944 (1949), the court said:

> "It is conceivable that persons, either individually or acting in concert might so use the state judicial process as to deprive a person of his property without due process of law, or of equal protection of the laws, yet we are certain that to make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law. To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision. The Fourteenth Amendment did not alter the basic relations between the States and the national government."

Since, appellant did not in any event offer any evidence that the State proceeding was a complete nullity, summary judgment was properly granted in favor of defendants. See Powell v. Workmen's Compensation Board, 327 F. 2d 131, 137 (2nd Cir. 1964).*

* It appears clear that judges acting in the court of their jurisdiction are immune from federal Civil Rights Law injunctions except in the most extreme situations when a litigant cannot vindicate his rights through the State judicial system, Mitchum v. Foster, 407 U.S. 225 (1972); Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Dombrowski v. Pfister, 380 U.S. 479 (1965). While the Supreme Court has held that state judges are immune from damage claims under § 1983, it has yet to decide whether judges are immune from a suit seeking injunctive relief. Compare Lusk v. McDonough, 386 F. Supp. 183, 184 (E.D. Tenn. 1974); Coogan v. Cincinnati Bar Assn., 431 F. 2d 1209, 1210 (6th Cir. 1970); Sexton v. Barry, 233 F. 2d 220 (6th Cir. 1956), cert. denied 352 U.S. 870 (1956), with Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974); Erdman v. Stevens, 458 F. 2d 1205, 1208 (2nd Cir. 1972), cert. denied 409 U.S. 889 (1972), Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117, 123 (S.D.N.Y. 1969), affd. on other grounds 401 U.S. 154)(1971). However, it should be noted that in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) the Court extended the principles of Younger v. Harris, 401 U.S. 37 (1971) to civil proceedings akin to criminal prosecutions. See 420 U.S. at 603.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

Dated: New York, New York
August 6, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BERNADETTE MERLINO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Judges herein. On the 6th day of August , 1976 , she served the annexed upon the following named persons :

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Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Bernadette Merlino

Sworn to before me this
6th day of August , 1976

A. Seth Greenwald
Assistant Attorney General
of the State of New York